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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 235

NORMAN GRADSKY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

In response to the Brief in support of NORMAN GRADSKY'S Petition for Writ of Certiorari, the Government makes two points. First, that only one conspiracy existed, and the second, that there is no reason to believe that the Jury considered any part of the indictment unsupported by evidence as proof.

The Government in no way replies to NORMAN GRADSKY'S contention that if a conspiracy existed, it was one against Inter-City Finance Corporation, and not with Inter-City Finance Corporation. There is no showing in the record that there was any knowledge on the part of any officer of Inter-City Finance Corporation of the creation of fictitious automobile paper to be used as the vehicle for siphoning funds to National Auto Brokers. Regardless of the proof submitted concerning that fictitious automobile paper, it was not proof of the charge made in the indictment, but only proof at best of a separate conspiracy against and not with Inter-City Finance Corporation.

As to the second point, the Government contends that there is no reason to believe that the Jury considered as proof, any charge of the indictment, which was unsupported by the evidence.

The fact is that there is no reason to believe that the Jury did not consider the indictment as proof. A Defendant is entitled to every protection which should have been provided by an appropriate Jury instruction. The Court's admonition contained in its lengthy charge to the Jury, can only be considered as illusory protection.

The Court, by omitting issues to be sent to the Jury unsupported by the evidence, committed error. *Mellor* v. *U. S. (8 CIR 1947), 160 Fed. 757, 763. Chambliss* vs. *U. S. (8 CIR 1956) 218 Fed. 154.*

CONCLUSION

For the reason stated in the Briefs of NORMAN GRADSKY, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 235

NORMAN GRADSKY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 251

LEON GRADSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 804-805) is reported at 342 F. 2d 426.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1965 (R. 806). Norman Gradsky's

petition for a rehearing was denied on April 9, 1965 (R. 807-809); Leon Gradsky's on April 15, 1965 (R. 811-815). In No. 235, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including June 8, 1965, and the petition was filed on that date. In No. 251, Mr. Justice Black extended the time for filing a petition to and including June 14, 1965, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In No. 235:

1. Whether the evidence showed a single conspiracy.

2. Whether the district court committed plain error in sending a copy of the indictment to the jury at its request without repeating its earlier instruction that the indictment was not evidence.

In No. 251:

3. Whether the district court committed plain error in failing to instruct the jury regarding one petitioner's post-conspiracy declaration.

4. Whether the district court erred in failing to instruct the jury that where the evidence is circumstantial guilt must be established by evidence excluding every reasonable hypothesis of innocence.

5. Whether the district court committed plain error in allowing a government witness to testify that petitioner told him to take the Fifth Amendment.

STATEMENT

Petitioners Norman Gradsky (No. 235) and Leon Gradsky (No. 251) were charged in the United States District Court for the Southern District of Florida in Counts 1 through 5 with violations of the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. 77q(a), in Counts 6 through 10 with mail fraud violations under 18 U.S.C. 1341, and in Count 11 with conspiracy to commit such offenses. The jury found Norman Gradsky guilty on all counts (R. 779) and Leon Gradsky guilty on all counts except 2 and 9 (R. 778). Norman Gradsky was sentenced to imprisonment for five years on each of Counts 1 through 5 to run concurrently, placed on five years' probation on Counts 6 through 11, and ordered to pay $10,000 in fines (R. 791-792). Leon Gradsky was sentenced to imprisonment for five years on Counts 1, 3, 4, and 5 to run concurrently, placed on five years' probation on Counts 6, 7, 8, and 10, and sentenced to imprisonment for three years on Count 11 to run consecutively to the sentences on Counts 1, 3, 4, and 5 (R. 789-790). On appeal (R. 793, 794), the convictions were affirmed (R. 806).

The basic scheme shown by the evidence involved the control of Inter-City Finance Company (hereinafter called "Inter-City"), Miracle Loan Company ("Miracle") and National Auto Brokers ("National") by petitioners and others charged in the indictment. The scheme was to sell interest-bearing 364-day notes of Inter-City to the public and then divert these funds through Miracle and National to petitioners and others for their own use.

Inter-City representatives, including Leon Gradsky, advised investors that the company was in the factoring business, that it loaned money on used cars, and that it was earning as much as 60 percent and could afford to pay 15 percent on the notes (R. 133, 368, 429-430, 451, 610, 642-643). The investors were told that Inter-City would always have on hand collateral valued at 125 percent of the amount invested by the public, and that the collateral would be assigned to the investors (R. 127-128, 368, 432). For the period from April 1958 to June 30, 1959, Inter-City sold $600,150 of its notes to investors (R. 652-653). The investors were paid interest on their notes as late as April 1959, but no money was paid on the principal (R. 125, 135, 234-235, 373, 374, 382-383, 392-393, 399-400, 407-408, 419, 434, 452, 459-460, 612-613, 644).

There was no record of the corporation showing any profit from April 1958 to June 1959 (R. 599, 604-605). An Inter-City financial statement prepared by a Mr. Hoch at the direction of Leon Gradsky and others was shown to investors (Gov. Ex. 70, R. 492-493, 501, 457, 498-499). It falsely showed a profit of $27,262.34 for the period ending August 15, 1958. This figure was arrived at by including $48,250 as income from purported sales by Inter-City of four businesses for which there was no supporting evidence in the records (R. 674-675, 598).

In September 1958, an accountant who had been hired by Leon Gradsky to make a signed C.P.A. financial report of Inter-City, stated that he could not do so since there was not enough reliable infor-

mation to confirm the authenticity of the books and records (R. 523, 525-526). Another accountant hired by Inter-City stated that he had to decrease the valuation of assets by $409,209.56 from that shown on the books because there was no evidence of value for those assets (R. 589-590, 598-599).

Petitioners used several methods to divert to their own use the proceeds from the sales of Inter-City notes to investors. The principal device was to siphon these funds through Inter-City's subsidiary, Miracle Loan Company. From August 1958 to June 1959, $339,206.25 was paid directly or indirectly to Miracle, which purportedly disbursed the money as small loans. In fact, $309,297.64 of these "loans" was paid to insiders of Inter-City (R. 656-657). National, Norman Gradsky's wholly-owned corporation, received $198,205.10; Mrs. Norman Gradsky, $10,800; and Credit Finance Corporation, wholly-owned by Mrs. Norman Gradsky, $41,495.05 (R. 657-659).

From December 1958 to March 1959, when National was receiving substantial sums from Miracle, National diverted $47,053.35 to Leon Gradsky by checks drawn to L. G. Enterprises, Inc. and endorsed by Leon Gradsky, and by checks drawn to "Leon Herman", a name used by Leon Gradsky (R. 667-668).[1] Leon Gradsky also received $21,703.27

[1] Evidence that Leon Herman was Leon Gradsky came in without objection (p. 8, *infra*). An accountant testified that Norman Gradsky had so told him. There was also in evidence a record of Leon Herman's account at the bank which shows the address as L.G. Enterprises, Leon Gradsky's firm (Ex. 30, 64, 65).